

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1995 SESSION

FILED
May 24, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
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 APPELLEE,)
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 v.)
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 DERRICK K. GARRIN,)
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)
 APPELLANT.)

No. 02-C-01-9501-CR-00028

Shelby County

Joseph B. Brown, Jr., Judge

(Murder in the Perpetration of a
Robbery and Attempt to Commit
Murder Second Degree)

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OPINION FILED: _____

AFFIRMED

Joe B. Jones, Judge

OPINION

The appellant, Derrick K. Garrin, was convicted of two (2) counts of murder in the perpetration of a felony, i.e., robbery, and two (2) counts of attempt to commit murder in the second degree, a Class B felony, by a jury of his peers. The jury sentenced the appellant to life in the Department of Correction for both counts of felony murder. The trial court, finding that the appellant was a standard offender, imposed Range I sentences of nine (9) years confinement in the Department of Correction for one count of attempt to commit murder in the second degree and twelve (12) years confinement in the Department of Correction in the other count of attempt to commit murder in the second degree. The trial court ordered that the two life sentences are to be served concurrently. However, the sentences for attempt to commit murder in the second degree are to be served consecutively as well as consecutively to the two life sentences. The effective sentence imposed was life imprisonment plus twenty (21) years confinement in the Department of Correction.

The appellant presents five (5) issues for review. The first two issues address the sufficiency of the evidence. He contends that the evidence contained in the record is insufficient, as a matter of law, to support a finding by a rational trier of fact that he is guilty of murder in the perpetration of a felony or attempt to commit murder in the second degree beyond a reasonable doubt. He also contends that the trial court committed error of prejudicial dimensions by denying his motion to suppress any statements he gave to a law enforcement officer, and denying his motion in opposition to severing the co-defendants. He further contends that he was denied a fair and impartial trial because a juror concealed a personal relationship with a victim and a victim's family.

The judgment of the trial court is affirmed.

Tommy Blackmoan and Carlito Adams had an argument during a pickup basketball game at a neighborhood park. The argument involved a call made during the game. Apparently, there was no referee and the participants in the game called violations on other participants. The argument had occurred a few days before the incident in question. Blackmoan thought the matter had ended. The calls and arguments occurred in most

pickup basketball games.

On the afternoon of April 20, 1992, Damon Dawson, Tracy Johnson, Eric Thomas, and Blackmoan were together. They had known each other most of their lives. They went for a ride before returning to Dawson's residence at approximately 3:30 p.m. They parked in the driveway. They sat in the car while drinking from a bottle of gin and smoking marijuana.

Adams, apparently still angry, solicited the assistance of friends. Kevin Burns, Benny Buckner, Richard Morris, and the appellant met at Kevin Shaws's apartment in Whitehaven. Later, they travelled in two cars to the home of Carlito Adams. The appellant was armed with a .32 caliber revolver, Burns was armed with a .32 caliber semi-automatic pistol, Buckner and Shaw had .380 semi-automatic pistols, and Adams had a semi-automatic pistol of an unknown caliber. They then walked to the Dawson residence.

Carlito Adams and another person¹ approached Dawson's motor vehicle at approximately 3:45 p.m. on the afternoon of April 20th. Adams went to the back door on the passenger side and opened the door. He told Blackmoan to get out of the car. Dawson told Blackmoan not to exit the vehicle. While the door was partially open, Blackmoan pushed the door open with force, the door hit Adams, and Adams fell to the ground. Blackmoan then ran to Dawson's residence and entered the residence through the rear door. As Blackmoan was running away, the appellant admittedly shot at him. A projectile creased Blackmoan's arm.

The Adams gang pulled their weapons and instructed Dawson, Johnson, and Thomas to give them anything of value that they had on their person. All three complied with this request. The occupants of the vehicle were not armed and kept their hands in the air except to retrieve their money and jewelry. The Adams gang then opened fire on Dawson, Johnson, and Thomas. Dawson was shot five times and died due to the internal damage caused by the projectiles. Johnson was shot once through the heart. He also died as a result of the internal damage caused by this projectile. Thomas was shot three times. He underwent surgery to remove one of the bullets. He survived the ordeal.

The Homicide Bureau of the Memphis Police Department conducted an

¹It is not clear from the record who initially approached the vehicle with Adams. It appears that Kevin Burns was with Adams when Adams approached the vehicle.

investigation into the robbery-murder of April 20th. They apparently arrested Adams and Shaw, who resided in Memphis. Information obtained from these individuals led to the appellant's arrest. He gave two statements. He admitted that he was present at the Dawson residence and shot at Blackmoan. He denied shooting into the vehicle. When two pistols were taken to the West Memphis Police Department, the Memphis officers obtained the weapons. The appellant identified the .32 caliber revolver as the weapon he had on the date in question.

An expert examined the projectiles recovered from the bodies of Dawson, Johnson and Thomas. The pistols were test fired by the expert. It was established that Dawson was shot once with the revolver and four times with a semiautomatic pistol. Johnson and Thomas were shot with a .32 semi-automatic pistol.

Thomas and independent witnesses gave a description that matched the appellant's physical characteristics. Blackmoan made a positive courtroom identification of the appellant.

I.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571

S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Tuggle, 639 S.W.2d at 914.

In this case, the evidence is clearly sufficient to support a finding by a rational trier of fact that the appellant was guilty of two counts of felony murder and two counts of attempt to commit murder in the second degree beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The State of Tennessee established that the appellant was at the situs of the incident in question, he was armed, he admittedly fired shots at Blackmoan, a projectile fired from his weapon was found in Dawson's body, and he admitted that he was given part of the jewelry taken from the victims. In summary, the appellant was an active participant in the robberies, the murders of Dawson and Johnson that occurred incident to the robberies, and the attempts to commit murder in the second degree against Blackmoan and Thomas.

This issue is without merit.

II.

The appellant contends that the trial court committed error of prejudicial dimensions by denying his motion to suppress the statements he made to law enforcement officers.

The record reveals that the appellant filed a motion to suppress the statements. The appellant and the trial court acknowledged that there had been a pre-trial hearing on the motion to suppress, and the trial court ruled upon the motion. However, the record does not contain a transcript of the suppression hearing.

When an accused seeks appellate review of an issue, it is the duty of the accused to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to the issues which form the basis of the appeal. Tenn. R. App. P. 24(b); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994); State v. Oody, 823 S.W.2d 554, 558-59 (Tenn. Crim. App.), per. app. denied (Tenn. 1991). When, as here, the record is incomplete, and does not contain a transcript of the proceedings relevant to an issue presented for review, this Court is precluded from considering the issue. Furthermore, this Court must conclusively presume that the ruling of the trial court denying the accused relief was correct. State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Rhoden, 739 S.W.2d 6, 16 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

This issue is without merit.

III.

The appellant filed a motion opposing the severance of defendants in this case. However, the record does not show that this motion was brought to the attention of and ruled upon by the trial court before trial. In addition, the appellant does not state where the pertinent information can be found in the record.

A.

The accused, as the movant, has a duty to bring a pre-trial motion to the attention of the trial court. See generally State v. Kinner, 701 S.W.2d 224, 227 (Tenn. Crim. App.), per. app. denied (Tenn. 1985); State v. Burtis, 664 S.W.2d 305, 310 (Tenn. Crim. App.),

per. app. denied (Tenn. 1983). In Kinner the Court said: "The filing of a motion with the clerk without presenting it to the trial court for determination is of no effect." 701 S.W.2d at 227. Moreover, when the accused appeals the ruling on a motion, the accused must see that the record reflects the motion was brought to the attention of the trial court, and the trial court ruled on the merits of the motion. See Burtis, 664 S.W.2d at 310. In summary, this Court will not consider an issue involving a pre-trial motion unless the record transmitted to this Court reflects that the issue sought to be reviewed was presented to and passed on by the trial court. See Burtis, 664 S.W.2d at 310; Kinner, 701 S.W.2d at 227.

B.

The appellant has failed to state in his brief where the requisite information pertaining to this issue can be found in the record. Tenn. R. App. P. 27(g); Tenn. Ct. Crim. App. R. 10(b). This constitutes a waiver of the issue. State v. Killebrew, 760 S.W.2d 228, 233-34 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Gilbert, 751 S.W.2d 454, 462 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Moore, 713 S.W.2d 670, 675-76 (Tenn. Crim. App. 1985), per. app. denied (Tenn. 1986). It is not the responsibility of this Court to search the record for the purpose of locating pleadings, evidentiary hearings, and facts to decide issues which are not supported by citations to the record. Killebrew, 760 S.W.2d at 233.

C.

When an accused seeks appellate review of an issue, it is the duty of the accused to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to the issues which form the basis of the appeal. Tenn. R. App. P. 24(b); Bunch, 646 S.W.2d at 160; Banes, 874 S.W.2d at 82; Oody, 823 S.W.2d at 558-59. When, as here, the record is incomplete, and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record, upon which the accused relies, this Court is precluded from considering the issue. Furthermore,

this Court must conclusively presume that the ruling of the trial court denying the accused relief was correct. Roberts, 755 S.W.2d at 836; Rhoden, 739 S.W.2d at 16.

This issue is clearly without merit.

IV.

While the trial was in progress, a juror and an alternate juror advised the trial court that they recognized people in the courtroom. These people were relatives of the victims in this case. The juror indicated that she went to the same church as a victim's grandmother and she recognized the mother of the same victim. The trial court asked the juror if this would prevent her from being fair and impartial in deciding the guilt of the appellant. She stated that this would not influence her views in determining the accused's guilt. A discussion ensued between the trial court and counsel for the parties. Defense counsel requested that they be permitted to discuss this matter with the appellant. The court declared a recess. When court reconvened, defense counsel advised the trial court that the appellant had no objection to either the juror or the alternate juror continuing to serve on the jury.

The appellant has waived this issue by withdrawing any objection that he had to the juror and alternate juror. Tenn. R. App. P. 36(a) provides in part that a party is not entitled to relief if the "party [is] responsible for an error or . . . failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." It is an elementary principle of law that a party may not register an objection, later withdraw that objection, and subsequently raise the issue post-trial. This Court will not place a trial court in error for failing to consider something which a party withdrew from its consideration.

This issue is equally without merit.

JOE B. JONES, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

JOHN K. BYERS, SENIOR JUDGE